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May 27, 2019

Clerk, United States District Court
Eastern District of Michigan
Theodore Levin United States Courthouse
231 West Lafayette Blvd
Detroit, Michigan 48226

RE: KILPATRICK v. UNITED STATES OF AMERICA
Cause No. 2-10-cr-20403-NGE-MKM-1

Dear Clerk,
Please find and accept for filing MOTION TO RECONSIDER THE DISQUALIFICATION/RECUSAL OF FEDERAL DISTRICT JUDGE NANCY G. EDMUNDS pursuant to SECTION 455(a) of Title 28 of the United States Code ("Section 455(a)) and MEMORANDUM IN SUPPORT. ORAL ARGUMENT REQUESTED.

I. PRELIMINARY STATEMENT

Pursuant to an Order entered on May 22, 2019 ("Order"), Judge Nancy G. Edmunds, United States District Judge, refuses to recuse herself from further participation in these proceedings for failing to comply with the standards imposed upon her under Section 455(a).

The striking flaw in the Order is the utter failure to recognize Section 455(a) is self-executing. The statute imposes an affirmative obligation upon federal judges to recuse themselves sua sponte whenever their impartiality might be reasonably questioned. Contrary to assertions in the Order, there is no Timeliness factor intertwined with this affirmative and immutable obligation. And given the failure to deny any of the hard facts, the reliance upon an "Untimeliness" defense falls of its own weight, separate from its irrelevance to the Section 455(a) duties and responsibilities. Judge Edmunds would apparently like to skirt her statutory obligations and simply skate onto the next case. Further proof of this conclusion is found in the Order.

Judge Edmunds performs a sleight of hand to escape Section 455(a) obligations. The Order claims the Section 455(a) is "Moot" because Judge Edmunds previously decided the "official act" issue against Petitioner. This claim is legally bankrupt. The issues are distinct. The "official act" issue has nothing to do, AT ALL, with the Section 455(a) motion. To attempt to thwart consideration of the Section 455(a) motion and shelve the bias, lack of impartiality and other recusal issues on the purported ground of mootness sets a new low for intellectual honesty in this case.

The Section 455(a) motion is independent of the Motion to Reconsider the "official act" issue (in view of the recent Sixth Circuit Decision for Oral Argument in a similar case regarding the very same MCDONNELL issues). Invoking mootness demonstrates that Judge Edmunds will assert just about anything to avoid Section 455(a) scrutiny. She must know full well the multiple conflicts-of-interest involving Attorney Thomas tainted his representation of the Petitioner and will not withstand vigorous, independent scrutiny. Hence the mootness claim skulks in the Order.

The case demonstrating Judge Edmunds lack of impartiality and bias (both perceived and actual) is laid out with excruciating detail in the prior Filings and Exhibits in support of the 455(a) Motion. Petitioner incorporates by reference these materials into this Motion.

II. THE SECTION 455(a) MOTION IS TIMELY

Contrary to the Order, the Section 455(a) Motion is Timely. The Order claims the Section 455(a) Motion violates Rule 7.1(h) of the Local Rules of the Eastern District of Michigan ("Rule 7.1(h)"). Nothing could be further from the truth. Local 7.1(h) provides "a motion for rehearing must be filed within 14 days after entry of the judgment or order." The Order concedes the Motion for Reconsideration was filed on April 4, 2019 under the "prisoner mailbox rule." April 4, 2019 is the same date when Petitioner delivered the motion to prison authorities for forwarding to the Clerk of the Court...and also the date that the envelope carrying this motion was postmarked). Given these dates there is no doubt the Section 455(a) Motion and the Motion for Reconsideration were filed within the time parameters fixed pursuant to Local Rule 7.1(h). The last filing date pursuant to the applicable rules was April 5, 2019, and both Motions (as stated) were filed on April 4, 2019.

The "Untimeliness" assertion is not only wrong, but also a mistake in fact and law by the court. It also reveals the apparent desperation in resorting to the time-bar claim to foreclose consideration of the recusal issues.

The Order claims the effective filing date is March 19, 2019, the date of the Order. The rule expressly provides the effective date is "14 days after entry of the Order." In this case the expressed date the Order was "SO ORDERED" was March 22, 2019. Accordingly the "Untimeliness" should be ignored.

The failure of Judge Edmunds to correctly compute the days between entry of her Order and filing of the Motion under Section 455(a) to Disqualify her is striking. Similar to her pretense regarding the absence of hard facts compelling her to stand-down, the Order asserts without foundation that the Motion to Recuse is untimely. Judge Edmunds reliance upon Chronos (father time) and his hourglass to escape scrutiny under the bright penetrating searchlight of Section 455(a), has the same lack of substantive pertinence as the Alice-in-Wonderland reply to the clear-cut facts demonstrating the appearance of bias and the appalling absence of impartiality. There is not an iota of doubt that Judge Edmunds must stand down.

The Order to draw a distinction between the Motion for Reconsideration and the Section 455(a) Motion seeking Recusal. Despite the error of this treatment, the motion is deemed "filed under the prison mailbox rule on the day the motion is dated." See Dock v. Wilson 2018 U.S. Dist. Lexis 163934 (E.D. Mich. 2018), and a number of other cases.
For purposes of the Timeliness issue under 7.1(h), the distinction makes no difference because both Motions were filed and postmarked at the prison on the same date; April 4, 2019.

Rule 6(a)(1)(A) of the FRCP provides: (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any Local Rule..."(1) When the period is stated in days or a longer unit of time; (A) Exclude the day of the event." The period, hence, the last filing day under Rule 7.1(h) was April 5, 2019, because the Order was Entered ("SO ORDERED") on March 22, 2019. The Order states the Order was entered on May 19, 2019. That conflicts with the official court record.

What is curious, both the AUSA and Judge Edmunds send filing to Petitioner through the regular prison mail. Undoubtedly to delay his receipt and significantly diminish his response time. Petitioner has no access to any means or methods of receiving information, decisions, or Court Orders in his case, except from the court itself. Although the court's practice of sending communications of its decisions and orders through the extremely delayed prison mail system (and not sending through the Prison Legal Mail System) is technically permissible. This practice is professionally reprehensible given what is at stake.

III. DUCK AND COVER

What is truly striking about the Order is Judge Edmunds' failure to deny any of the material operative facts demonstrating the Judge must recuse herself as a consequence of : (1) Her relationship/association/friendship with Attorney Thomas and his wife; (2) Her failure to affirmatively disclose (at any time prior to or during trial or even today) her relationship/association/friendship with Attorney Thomas and his wife; (3) Her failure to conduct any meaningful inquiry into no fewer than three conflicts-of-interest between Attorney Thomas and/or his firm and the Petitioner while Attorney Thomas acted as counsel for the Petitioner in this criminal proceeding; (4) He turning a blind-eye to the three conflicts-of-interest because of her relationship/association/friendship with Attorney Thomas and his wife; (5) Her devising a half-baked "cure" for one of the conflicts-of-interest mentioned in sub-paragraph (3); (6) Her repeated denials of requests from Petitioner (prior to trial) to replace Attorney Thomas and appoint new counsel.

Not once in the Order does Judge Edmunds deny any of these hard facts. Instead, her order engages in a "through the looking glass" response referring to "an alleged friendship with Defense Counsel; The "purported friendship between Judge Edmunds and Defense Counsel"; "The conversation that allegedly took place between Judge Edmunds and Defense Counsel prior to trial' and on and on throughout the Order. Judge Edmunds also attempts to deflect the Gale Force of the facts and law mandating sua sponte recusal by engaging in a mantra of general legal conclusions devoid of any relevance to the particular circumstances of this case. Citing a string of decision or simply uttering the conclusory assertions (see Order).

None of these irrelevant citations or glib legal conclusions address or refute (in any way) the facts and law demonstrating recusal is imperative to protect the Fifth and Sixth Amendment rights of the Defendant from further violation and invasion. And to safeguard the integrity of the judicial process. Apparently, Judge Edmunds believes the Recusal Motion should be ignored because "a criminal trial is too serious and costly." (Opinion/Order)

She also cavalierly contends "a reasonable person would not question Judge Edmunds impartiality." (Opinion/Order)

The burden to the judicial system with respects to expense has not been increased because Petitioner has invoked his rights under the Constitution. Judge Edmunds failure to adhere to her obligations as an Officer of the Court; recognize her bias and bow to the statutory mandate imposed under Section 455(a) has caused the increased expense and burden, and impeded the efficient administration of justice.

Oddly, Judge Edmunds in the Order never refers to Attorney Thomas by name. Rather, he is "defense counsel", never Attorney Thomas. Almost as if Judge Edmunds would like to erase any mention of him to distance herself from him. But Attorney Thomas is in this case; the same way his conflicts-of-interest with Petitioner are in the case; the same way the failure of Judge Edmunds to investigate these conflicts are in the case; the same way the failure to disclose her relationship with Attorney Thomas is in this case; as are all of the additional razor-sharp facts compelling disclosure scream for justice in this case. Pretending these facts do not exist does not excuse them from the true reality of what occurred, nor does the stark failure to deny them reduce their determinate effect upon the outcome of this motion. Judge Edmunds cannot escape the stringent operation of Section 455(a). Through oblique denials when the facts cry out for her to step down in favor of an unbiased and impartial judicial officer.

In a litany of deficient features infecting the Order, perhaps the most striking is Judge Edmunds using an old "Duck and Cover" routine as a substitute for legitimate argument. The old routine; "Duck and Cover", is the same routine taught to school children at the height of the Cold War in the event of atomic attack. Just as ducking under a desk and covering your head with your hands was illusory protection against an atomic bomb, the same holds true with respect to the Duck and Cover defense to the Section 455(a) Motion.

Judge Edmunds "ducks" under a shroud of Untimeliness, Mootness, Procedural Defaults, Clear Limits of Time Prescriptions, Failure to Adhere to Court Deadlines, Fantasy Denials and an assortment of other Technical Contentions aimed at "ducking" the substantive issues. Next, Judge Edmunds attempts to use these Technical Defenses to "cover" her lack of any pertinent response to the hard facts and controlling law compelling her recusal. Quite frankly, "duck and cover" is no way for a Federal Judge to operate. Just as Attorney Thomas exalted money over morality. The shallow technical assertions and diversion techniques set forth in the Order indicate Judge Edmunds has elevated pride over duty, to the detriment of the Petitioner; his Fifth and Sixth Amendment Rights, and the integrity of the trial process, and the public perception of that process. This kind of Duck and Cover Response should not be countenanced.

IV. DUE PROCESS AND RECUSAL

As mentioned above, the Order erroneously treats the Motion for Reconsideration and the Section 455(a) Motion as one and the same. The only discernable reason for this incorrect lumping is an attempt to deny Petitioner the right to file a Motion for Reconsideration in the event the original motion seeking recusal was denied. Perhaps not unexpectedly, Judge Edmunds denied the Motion to Disqualify/Recuse, and now attempts (in the Order) to weld both motions together are just a further attempt to curtail presentation of the recusal issues and highlighting her inability to respond to the reasons compelling recusal in a cogent and straight-

forward manner. This Motion for Reconsideration is proper. And Petitioner further requests the right to reply to any opposition the government may file and also requests Oral Argument.

Due Process requires a judge possess neither actual nor apparent bias. See, e.g., In Re Murchison, 349 U.S. 133, 136 (1955) (Black, J.) ("A fair tribunal is a basic requirement of Due Process."); Caperton v. A.J. Massey Coal Co., 506 U.S. 808, Mason v. Burton, 730 Fed. Appx. 241, 244-45 (6th Cir. 2017) (Same) 876 (2009) (Kennedy, J.) CIT is Axiomatic, "A fair trial in a fair tribunal is a basic requirement of Due Process.")

Sadly, in this proceeding justice is neither honored nor served, as a consequence of Judge Edmunds failing to recuse herself. Indeed, the fairness of a proceeding is irrevocably undermined if held before a judge with actual bias, and Section 455(a) is hyper-sensitive to this bedrock principle in insisting upon recusal sua sponte at the appearance of bias. The material operative facts demonstrate circumstances "external to the judicial proceeding" (Mason, supra at 245) require recusal.

Doubts about bias must be resolved in favor of recusal. United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993) ("Where the question is close, the judge must recuse [herself]" citing Roberts v. Bailar, 621 F.2d 125, 129 (6th Cir. 1980).

Notwithstanding the "technical" hubbub and the sound and fury of Judge Edmunds' conclusory denials, the stark fact remains that Judge Edmunds has not denied (or really attempted to deny) the facts mandating recusal. Those facts are set forth in meticulous detail in Exhibit Two to the Affirmation of Kwame Kilpatrick filed in support of his motion. They warrant revisiting in summary form in as Judge Edmunds continues to pretend they do not exist:

i. At the onset of the proceedings, Judge Edmunds failed to disclose the existence of an ongoing friendship/social relationship with Attorney Thomas and his wife;

ii. Even at this early stage, Attorney Thomas had at least one conflict-of-interest with his representation with Petitioner. Thomas actively represented a government witness in connection with the grand jury proceedings in this case. Judge Edmunds and most certainly the AUSA were aware of this conflict and said nothing when Thomas appeared as counsel for Petitioner;

iii. As fully detailed in the prior filings, Judge Edmunds concocted a fleeting inquiry into the multiple conflicts-of-interest involving Attorney Thomas and/or his law firm (the O'Reilly Firm) and the Petitioner: When these conflicts emerged, Judge Edmunds failed to interview any of the members of the conflicts committee at the O'Reilly Firm, nor any other lawyer associated with the firm. Judge Edmunds failed to conduct a meaningful inquiry, nor any meaningful investigation into the conflict matters whatsoever. She simply assumed that a "Chinese wall" had been erected seemingly because the Thomas and the O'Reilly firm had "separate filing systems." Judge Edmunds conveniently ignored the common O'Reilly Firm website, and the marketing of the legal services of Thomas over this same website;

iv. Judge Edmunds repeatedly denied or ignored requests from Petitioner to remove Attorney Thomas and appoint new counsel;

v. Judge Edmunds brought in an outside lawyer to represent Petitioner with respect to "limited aspects" of this proceeding. The lawyer was unfamiliar with the case, and had no meetings with other defense lawyers to discuss trial strategy, nor specific issues relating to the case. Judge Edmunds called this a "cure". But it did not alter or change the existence of multiple conflicts, in any way, and this "cure' worked to destroy Petitioner's access to confront witnesses, and left Petitioner with no representation whatsoever during critical periods of the trial proceedings;

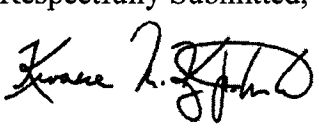
vi. The weeding card incident evidences existence of a friendship/social relationship/ association between Judge Edmunds and Attorney Thomas and his bride. (Full discovery would be appropriate to comprehend the extent and intensity of the connection. the Order (especially the oblique denials) demonstrate there is a treasure trove of facts waiting to be uncovered concerning Judge Edmunds and her relationship with Attorney Thomas, as well as other players involved (e.g. co-counsel, lawyers at the O'Reilly firm, ex-parte meetings and discussions with Thomas, AUSAs, and others, etc.).

Nothing in the order addresses these and other facts compelling recusal. Judge Edmunds has not and cannot deny them. She simply wants to sweep them under the rug, finish the whitewashing, and go onto the next case. Appellate Review will undoubtedly interrupt her journey if Judge Edmunds fails to abide by the statutory directive to recuse herself sua sponte because there is no doubt her "impartiality might be reasonably questioned."

V. CONCLUSION

For the following reasons the Motion to Disqualify should be granted. Petitioner's Section 455(a) Motion for Disqualification is NOT "Untimely". The court makes a conclusion that is a mistake in fact and law. Therefore, Rehearing/Reconsideration of the motion (and the specific "palpable defects" raised in the motion) should be heard on the merits. The Motion should be referred to an appropriate, unbiased, uncompromised, and independent judicial officer for adjudication.

Respectfully Submitted,



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pro se and in forma pauperis